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JUDGE HARPER'S SPEECH,

BEFORE THE

CHARLESTON STATE RIGHTS

AND

FREE TRADE ASSOCIATION,

AT

THEIR REGULAR MEETING, APRIL 1, 1832,

EXPLAINING AND ENFORCING

THE REMEDY OF NULLIFICATION.

"*Animis Opibusque Parati.*"

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1832.

JUDGE HARPER'S SPEECH.

After some remarks on the state of opinions at Washington, so far as he had been able to observe them, on the subject of the Protective Policy, Judge Harper proceeded to say, that the remedy of State interference, or Nullification, proposed in South-Carolina, began now to engage the attention of the people of the rest of the United States. Many individuals, even in the States most devoted to the Tariff policy, rejoice to apprehend that there may be a remedy for the usurpation of power, short of secession or civil strife; that there is a medium between disunion and consolidation; and that Nullification is not intended to make, but to prevent, a revolution. There are some, particularly in the western portion of the Union, who agree with us respecting the Rights of the States, though they differ from us as to the protecting system; who would not see all the grounds of liberty destroyed, and an absolute, consolidated government established, even for the sake of a policy to which they are favourably disposed. Our friends of the other Southern States encourage us to proceed. It is true they say to us—"the people of our States are less informed and less excited than in South Carolina, where these topics have been so long agitated. They are all devoted to Free Trade and to the Rights of the States. But with respect to the particular measures of resistance to be adopted, they are reluctant to express opinions on matters which they have not fully considered, and on which they are not fully informed, and you would in vain attempt to concert such measures with them. Such an attempt would call forth a thousand various projects and opinions; would lead to interminable discussions and negotiations; and be more likely than any thing else to retard or defeat any effectual resistance. No! South-Carolina, who has been hitherto in advance, must vindicate her right to the post, which she has assumed to herself. Let her act, and let a practical question be put to the people of the other Southern States, on which it is necessary to decide one way or the other; let it be proposed to them to make common cause with South-Carolina, or to aid in putting her down by violence; and there cannot be a doubt of their decision. They CANNOT sacrifice their dearest interests, renounce their long cherished principles, and forge chains for their own limbs and those of their posterity."

Let us examine a little the nature of this check of State interposition, or Nullification. All we ask is, that the arguments in its favour shall be examined with the strictest scrutiny. All we complain of is, that it is denounced without examination. Men appear unwilling to understand us. The very simplicity and obvious

character of some truths seem to render them utterly incomprehensible. It is, perhaps, natural to think that a very simple truth, which has long lain in the way of observation, must, if it were indeed a truth, have been discovered before; and if discovered, must have engaged the attention of reflecting men. But yet we know that this does not always happen, and that the most obvious and important truths have long escaped observation. It is now, however, no longer doubtful that the truth for which we contend was known to one eminent individual, who better than any one else understood the true character of our institutions. It is no longer disputed that Mr. JEFFERSON was the advocate of our doctrine, and the author of the term "Nullification." We hope that this will abate the distrust and aversion which have been entertained towards it.

No answer has ever been attempted to the common argument—that if individuals enter into a compact, and have no arbiter, or superior authority, to interpret it for them, each must decide on its interpretation, so far as respects the government of his own conduct; that if independent and sovereign States form a compact, each, not only may, but must of necessity determine the true meaning of the compact, so far as it is to be carried into effect by itself, or within its own territory.—And it is plainly impossible that any answer should be given. The argument in favour of the Constitution having provided such an umpire in the Supreme Court, rests upon this, viz:—It is taken for granted that by the 25th section of the Act of 1789, the appeal from the State Courts in the last resort, in cases involving any question arising under the laws and Constitution of the United States, is rightfully allowed to the Supreme Court; then, although the Supreme Court be not a political tribunal (as it has itself determined) but its only function being to decide the rights of individuals, yet, in the ordinary working of the Government, it will happen, that in deciding the rights of individuals, as they are affected by the conflicting State and Federal laws, this tribunal will determine how far either laws shall have operation and effect, and consequently what are the relative rights and powers of the Federal and State Governments; and this ordinary working of the Government can only be interrupted by some extra-constitutional or revolutionary movement.

I appeal to you whether this be not the whole of the argument; and fairly stated. I appeal to the advocates of the power of the Supreme Court, whether any thing can be added to it. And yet what sort of jargon is this? We have been accused of refined speculation—political metaphysics, it has been called—and often by men so long accustomed to verbal refinement as to have lost the faculty of distinguishing plain truth and direct argument when they are offered to them. But how is it that a tribunal professing to have *no* political power, shall exercise *all* political power?—that a constituent department of one government, certainly a weaker, and in some respects subordinate department, shall be the exclusive and final arbiter of the powers of that whole government? as well as of the powers of States acknowledged to be, for some purposes at least, sovereign and independent?

The truth is, however, that even in *the ordinary working* of the Government, the Supreme Court is not the authority of the last

resort. There is a power beyond that, in the Senate of the United States sitting as a Court of Impeachment. A Judge may be tried for a wilful violation of the Constitution, and the Senate may not only judge of him and his motives, but interpret the Constitution too, and that in the very last resort. Though a particular decision cannot be reversed, yet a rule of conduct will be furnished, to which the Court will in future be compelled to conform. Will you then say that the Senate is the supreme arbiter of the constitutional powers of the Federal and State Governments?

If the Constitution, (as it might very well have done) had not provided for the establishment of Courts by the Federal Government, but authorizing it to act on the persons and property of individuals, had left its laws to be carried into effect by means of the State tribunals, would you say that *those Courts*—the creatures of a State—whose rule of conduct might be prescribed by it—whose constitution might be modified by it at pleasure—whose very existence might be abolished at its will—were the supreme arbiters of the powers of their creator. The absurdity would strike every one; yet this is, to all intents and purposes, the argument of those who suppose such an arbiter to be found in the Supreme Court. Would not the relative powers of the State and Federal Government have been the same under that Constitution as under the present? The authority of the Supreme Court in relation to this matter, is precisely of the same character with that of every other functionary of both State and Federal Governments, whether legislative, executive, or judicial; all must, in the discharge of their proper functions, incidentally, and in the first instance, interpret the Constitution. To none of them is this interpretation committed as a substantive and ultimate power.

Our idea is the plainest in the world, if those who differ from us would deign to comprehend it. It is that ours is a confederacy, and nothing but a confederacy. The notion of a Government partly consolidated and partly federative; of State Governments partly sovereign and partly subordinate; is incongruous and impossible. Twenty-four distinct and independent sovereigns have agreed, by the constitutional compact, for certain specific purposes of common interest, to exercise their powers jointly. For this purpose they have provided, as other confederacies have done, for the appointment of a central council and authorities subordinate to it, called a Federal Government. It does not detract from its character as a Confederated Government, that they have provided (what has not been so usual among confederacies) that the central government, instead of making requisitions on the several contracting sovereigns, and carrying its regulations into effect solely by means of their authority, has power to make requisitions on individuals in the first instance, and to affect their persons and property. In thus acting upon individuals, however, it acts solely by the permission and under the authority, (as expressed by the compact of confederation,) of the sovereign in whose territory the jurisdiction is exercised. That sovereign may, therefore, inhibit any exercise of the power, rightfully and in good faith, if the joint authorities have exceeded the powers granted in the compact.

Let us suppose that in former times, when theological affairs engaged more of the attention of the world than they do at pre

ment, half a dozen of the sovereigns of Christendom had entered into a compact for the appointment, from their respective dominions, of an ecclesiastical council to regulate matters of religious faith and practice. Suppose them further to have stipulated that the council might appoint ecclesiastical tribunals to exercise jurisdiction within the dominions of each, that the regulations of the council, when within the scope of their authority, should be paramount to the temporal laws with which they should come in collision, or supreme, and, if you please, that there should be an appeal from the lay to the ecclesiastical tribunals, in cases involving any question of religious faith or practice. Would this ecclesiastical establishment have been any thing else than a part of the machinery of each of the contracting sovereigns for the government of his own dominions? This might have been dangerous power to grant, and have opened the way to the usurpation of powers not granted; but would any one have dreamed that by such compact, the council in question was constituted the rightful sovereign of all the dominions of the contracting parties?—that any sovereign might not rightfully control those tribunals when he perceived them to exceed their proper authority?—or that he was restrained by anything but the faith of the compact from suppressing them altogether, or banishing them his dominions.

This is not similar, but identical. The States, before the formation of the Constitution, were sovereign: they exercised, uncontrolled, all the powers of government. This is not matter of argument, but of historical fact, and established by evidence perfectly indisputable. They entered into a compact providing for the establishment of a common council, for the regulation of certain affairs of common interest, and provided that it should appoint officers and tribunals to execute its powers in the most effectual manner. Certainly the States did not stipulate to become consolidated for every purpose; to abandon altogether their sovereign character, and to become corporations. Yet, unless they have done this, I will prove, so that no one shall question it, that they must retain every right of sovereignty and have rightful power to control every tribunal and function within their respective territories.

What is sovereignty?—there is no mystery in this—sovereign—supreme—the highest and ultimate authority in a State. Such an authority there must, of necessity, be in every State. Can there be any doubt of this? It may not reside in a single individual, or a single department; as in the instance of the British Parliament of King, Lords and Commons. But when sovereignty is thus distributed the concurrence of all the departments is required to render any act effectual. If under our American constitutions, there were no provision for an appeal to the people in Convention, it might be said that sovereignty resided in the legislature, the executive and the judiciary, since there would be no ulterior authority to control any act in which they concurred. But the sovereignty would, in effect, reside in the legislature, which might organize and modify the other departments at its pleasure. It would be vain to talk of an abstract sovereignty residing in the people. A sovereignty which can never be called into action is a nonentity. If, under such a Constitution, the people should assemble and

modify the form of government, this would be revolution and force. When we speak of sovereignty, we mean the highest *legal* power, exercised according to the forms of the Constitution. It means this, or it means nothing. Is it possible to conceive of a State in which there is not such an authority?

There is a sense in which a sovereign may be said to be subordinate or dependant. A weaker sovereign has been subordinate to a more powerful one from the dread of superior force. But we speak of *legal* power. The process of the superior sovereign does not run into the dominions of the inferior. He does not control according to the forms of law. If he does, the inferior is no longer sovereign in any sense. He is but a functionary of the superior, governing power.

A State partly sovereign and partly subordinate; a government partly consolidated and partly federative, currently as this language has been repeated by those who have been contented to use words without ideas annexed to them, is a monster, inconceivable as the Chimæra. If, as some have suggested, sovereignty were distributed between the Federal and State authorities, then the concurrence of both would be necessary to render any act effectual. But is this the case? If the State does not possess the right of Nullification is its concurrence required to give effect to any act of the Federal Government? Is there any act of the State which may not be arrested on the ground of repugnance to the laws or Constitution of the United States? The argument in favor of the partial sovereignty of the States stands thus:—The States may regulate all their internal concerns; they may legislate on all subjects, but those on which they have surrendered their powers to the Federal Government; their laws have full operation and effect, and are the highest authority on the matters which they regulate—unless, indeed, the States transcend their rightful powers and their laws come into collision with the Constitution or laws of the Federal Government; then, to be sure, their operation is liable to be arrested; and the question, whether the States have transcended their powers, is to be judged of by the Supreme Court—a tribunal appointed by the Federal Government. Are those who argue thus aware that they have given us the very definition of the powers of a corporation?—that the pettiest town council—the associated grocers' company—is sovereign in the very sense they have supposed the States to be sovereign? Think—reflect—the laws of a corporation are binding on its members; they have full operation and effect, and are the highest authority on the matters which they regulate; unless the corporation transcends its powers, and its regulations come in collision with those of the superior government; then, indeed, their operation is to be restrained, and the question, whether the corporation has transcended its powers, is to be judged of by a tribunal appointed by the superior government. There can be no question of sovereignty or supremacy, but in the case of a collision of authorities, and the very test of sovereignty or subordination is, which shall judge of the validity of the other's act. And practically, is it not evident that a majority of the people of the United States, which elects the Congress and President, and indirectly appoints the Judges, may, if there be no right of State interposition, assume any power they may think

advantageous, and restrain the exercise of any power by the States that it thinks proper to exercise. If this be so, what is the sovereignty to the States?

To say that the States are sovereign, is to affirm, in terms, the right of Nullification. Unquestionably—if the term sovereignty has the only meaning that can be attributed to it, and signifies the authority in the last resort. I am aware that many who concede the sovereignty of the States, have done so without thinking it necessary to annex a meaning to the term, and that all, even our opponents, are willing to admit the States to be sovereign, in such sort, that they shall be subordinate for any purpose that it may suit the views of the governing majority to render them subordinate. But I have never been able to conceive how those who concede and contend for the right of a State to secede from the Union, can deny the right to nullify. The right of secession is founded on the sovereignty of the State, in the sense in which I have used the word. It depends on this—that when the State has declared the separation, the Federal authorities are bound to yield obedience and forbear the exercise of their functions. If a county or parish should think proper to declare a secession from the State, the pretention would be laughed at. The State authorities would be bound still to go on to execute the laws within the seceding district. And why is this?—because the county or parish is not sovereign. If it were, the State authorities would be bound to yield obedience. Those who contend for the State right of secession, cannot mean the right of rebellion or revolt. If they did, the Federal authorities would not only have the right, but would be bound to go on to execute the Federal laws, notwithstanding the act of secession. They must mean a *legal* right—the exercise of an authority to which all are bound to submit. But it is not easy to comprehend how the Federal authorities can be bound to submit, when they are commanded to forbear the exercise of *all* their functions and to suspend the execution of *all* Federal laws, when they would not be bound, if commanded, to forbear the execution of a *particular* obnoxious law, or how the State can be sovereign for one of these purposes and not for the other. The greater involves the less. Can it be, that a sovereign party must either acquiesce in having an attempted violation of the compact carried into effect within his own territory, or declare the compact at an end altogether?

Such are our views of our confederated system. The States constituted a confederacy before the formation of the Constitution; they form a confederacy still: they were sovereign before, and are so still. They have not, by adopting the Constitution, abandoned their separate and independent character and formed a consolidated empire. The people of each State, in their sovereign character, delegated powers for some purposes to the Federal, for other purposes to the State authorities; but within its territorial jurisdiction there is but one sovereign, and both Federal and State authorities, which are co-ordinate to each other owe it obedience, and are subject to its control. The appeal to the people in their sovereign character is within the forms of the Constitution; it is provided for by the Constitution itself, and comes within the ordinary working of the government. It is not revolutionary; that

is, a revolution by which the obligation of law is thrown off, and the forms of the Constitution violated. The sovereignty of the people is not an unmeaning abstraction, but the living and active principle of our institutions. Though in its character of sovereign, the State has the *legal* right to secede from the compact, even without alleging any violation of it on the part of the other contracting parties, and both Federal and State authorities would be legally bound to submit if it should do so, yet it has not the *moral* right. Its faith is bound to adhere to the compact, so long as it remains unviolated on the other part. So its faith is bound to submit to any alteration of the compact that may be made with the concurrence of three-fourths of the members of the confederacy. We do not attribute to the three-fourths, as has been supposed by some, any constitutional power of *construing* the Constitution. They have the power of amendment, however—of making it what they please; and this, in effect, will amount to the same thing.

Confusion has often been occasioned by using the same word with different meanings attached to it, and such has arisen from the use of the word *right* in different senses. Thus we speak of the *right* of resistance. Man has a natural and moral right to resist oppression. But this is not a legal right. He is bound to obey the laws, and the government has the legal right to punish him, if his resistance should prove ineffectual. These senses have been confounded by many who speak of the right of a State to secede from the Union. If this be a legal, a constitutional right, then all constituted authorities, Federal and of the State, are bound to yield to it. It involves, *a fortiori*, the right of Nullification. If it be not, then it is no more than the right of rebellion, and the Federal authorities are bound to go on and execute the Federal laws, notwithstanding the act of secession, and to punish those who resist them.

I think we may fairly assume that the dispute is reduced to this—whether this be a consolidated government, in which the States are mere corporations, or a confederation in which the States are sovereign—that there is no middle ground between Nullification and consolidation. Those who suppose the government consolidated, and the Constitution a mockery, are, however slavish, at least consistent in their opinions. But it is impossible to comprehend those who speak of the rights of a State which are in direct conflict with other rights of the Federal Government; of legal or constitutional rights, which there are no means of legally or constitutionally enforcing; of the right of a State, by seceding, to arrest and restrain all the laws and tribunals of the Federal Government, on the ground of an alleged infraction of the constitutional compact, and not to arrest the operation of that very act which constitues the infraction; of sovereignties which are not sovereign.

Ours is merely a confederacy; but the Constitution has guarded it against the dangers which have proved fatal to confederacies heretofore. It is authorized to make its requisitions on individuals, and is not left dependant on the caprice, the indolence, or the selfishness of the contracting sovereigns to carry its regulations into effect. True, the parties may interfere to arrest its operations, but this interference is effected with infinite difficulty. It is not

as if sovereign monarchs were the contracting parties, and the caprice or rashness of a single individual could in a single moment destroy the whole system. The sovereignty is made up of hundreds of thousands of individuals, whose ignorance you must enlighten, whose understanding you must convince, whose selfishness you must overcome, whose sluggishness you must stimulate, before you can induce their interference. They must act according to prescribed forms. It is impossible they should act hastily, and time will be afforded to correct misconceptions.

The negative or nullifying power in a State is the true, the only principle of free government, and, without understanding it as a principle, every government that has pretended to freedom, has acted upon it instinctively. The principle is, that when there are great, distinct and conflicting interests in the State, each must have the means of protecting itself. The negative power is one of defence, and can never be turned to purposes of aggression. The Patricians and Plebeians of Rome were distinct and hostile races—these were the conflicting interests. Rome was weak and enslaved, until the *nullifying* power was granted to the Plebeians; then she rose to greatness and glory; which only began to decline, when this anomaly in her Constitution was removed by the power of the emperors. The Constitution of England is founded, in theory, upon this—that society naturally tends to divide itself into a minority of those who possess wealth or other distinctions, and a majority of those who do not possess these advantages, and that each of these classes, as represented in their two houses of legislature, is entitled to a negative on the acts of the other; the monarch holding the balance between them. The Constitution of the States of Holland was founded on the territorial check. This confederacy seemed far weaker and more distracted than even our old confederacy; yet it did so happen that under this distracted Constitution, Holland rose to unprecedented greatness and prosperity, until pressed by the arms of Louis XIV, she reformed this peculiarity of her government, by recalling the House of Orange; and whether it be regarded as coincidence or consequence, from that time began the decline of Dutch power and prosperity. In this country, we have no distinction of rank, or classes; we have little distinction of wealth; our conflicting and discordant interests arise out of the geographical position of the different portions of the country; if there be oppression, it must be the oppression of a geographical majority, and if we would have free government, we must have a geographical check in the minority to oppose to it.

To borrow the idea of a distinguished statesman to whom I am indebted for many ideas on this subject, the necessity for this negative power is founded on the selfish principle in man; a man loves himself better than his neighbour. Hence the necessity of government; without it, the strong would arrogate to themselves all advantages, at the expense of the weak. If power be committed to one or a few, they will gratify their ambition, their avarice or their sensuality, at the expense of the many. Hence the necessity of representative government, which gives the power, in effect, to the whole society, or to a majority of it. But thus far government is evidently imperfect, because a portion of the society—the major

ity—may practice oppression upon another portion. Majority and minority are the conflicting interests, and if you would have a government free, you must give to each the power of self-protection. Every society, even the smallest, has a tendency to divide itself into parties geographically separated. This may easily be verified by regarding our State Governments. But in a representative government established over a very extensive country, it is absolutely impossible that there should not be a geographical majority and minority. This is the inherent vice of such government, against which you must guard if you hope to perpetuate it.

To say that a State has the right to secede or to resist, is not to say that the government is free. Turkish sultans have undergone the bow string, and a Paul of Russia has been strangled, but their governments are not on that account more free. The right of secession—what is that, but to say there is no means of resisting usurpation, but to dissolve the government. And can any one say that this will be a safer mode of redress? Will the majority be more likely to recognize this right than that of Nullification? Will they not have greater temptation to enforce their power? If we nullify merely, they may hope to have the disputed power granted by three-fourths of the States. The objectionable measures of the government will still be matter for discussion and compromise. But let the example of secession be once set, and the advantages which they derive from an union with us are gone forever! Let the Southern States once taste the advantages, so far as wealth is concerned, of a separate existence, and they are not likely to seek the Union again. If we have no right but that of resistance, the hopes of the Union are over. When resistance is threatened, the government must either yield to it or attempt to suppress it by force. If they attempt the latter course, then the civil strife which men now apprehend is sure to follow, and the government is scattered to the winds of heaven. Or is the government always to yield? What a weak and degraded government will that be? There is neither weakness nor degradation in submitting to an authority which is recognized as a lawful one. But it is impossible that that should answer the purposes of a government which is to yield to every threat of force. We may incur risk in the course we now propose to pursue; it may be that the authority we claim for the State will not be recognized, and that force will be resorted to. But certainly we have better hopes now, while there is still a feeling in every portion of the Union that we belong to a common country, than we can have in future, when there shall be wider alienation and deeper hostility. On the other side—without the check we contend for—there is *no risk*—there is the absolute *certainty* of all the evils and dangers which are threatened to our present course.

I cannot say that our principle, if it were generally recognized, would render our Union perpetual; but I can say, what it seems to me every reflecting person must perceive, that without it, its perpetuation is *impossible*. With it, I cannot see the chance of dissolution. I have heard it objected by some who thought the continuance of the Union, on any terms, incompatible with the interests of the Southern States, that such a power would render the Union too indestructible. The argument might be addressed

to the people of every State, who complained of the acts of the Federal Government—is not the redress in your own hands? I have attempted on a former occasion to shew that the exercise of this power by a State can never seriously embarrass the operations of the General Government, unless when applied to a law laying imposts and duties. Even in the case of war if one or several States should fail to contribute to the general force, this would not materially weaken the rest, who must have calculated their strength before hand. I have heard it said triumphantly—will you give to men the power of exempting themselves from taxation?—will you allow the people of a State to judge in a matter where their interests are so directly concerned? And why not? Our Anglo Saxon ancestors held it the very touchstone of liberty, that the people should have the power of granting their own money. Why is it that the people within a State, where their power in the matter is unlimited, do not exempt themselves from taxation? If a single individual in a State could exempt himself from taxation, while all the rest should continue to contribute, and the government go on as usual, you might find many individuals willing to avail themselves of this privilege. If the consequence of a single individual, thus exempting himself, were to be that all the rest of the society should do so too, and the government should be dissolved, you might still find, here and there, a reckless individual who would avail himself of the privilege even on these terms—but you would not find one in a hundred. Men are not unwilling to support government. The people hitherto have been attached to their Federal no less than their State Government. They will continue to be so, if you will allow them to consider it their own government, and not an extrinsic and antagonist power. To dissolve the government by withholding the necessary supplies, you must gain over, not one reckless individual in a hundred, but a majority, and more than a majority, of the whole people of the State. The fear is fantastical that the people of a State will arrest a law of taxation, unless they are satisfied of its inequality and injustice. The danger of their acting hastily, under ignorance or misconception of the true character of the law, is guarded against, so far as any danger in government can be guarded against, by the numbers that must concur, the discussion that must take place, the time that must be consumed, the forms that must be gone through, before they can be brought to act. This danger is as nothing, when compared to the opposite, or palliative danger of giving to an interested and irresponsible majority the unlimited power of exaction.

Great as the stake is, which the Southern States have in the present protecting policy of the government: though their prosperity certainly—perhaps their existence as States, may depend upon it—yet I regard this as a trifle, compared with the establishment of the *great principle* in government for which we contend—the power of the weaker interest in the body politic to protect itself. It is salutary that weakness should be able to say to power, "thus far shalt thou go, and no farther." The United States have set to the world the example of popular, representative government. The spirit of reform is abroad, and our example is followed. It is incumbent on us to carry out the lesson we have taught, and, (what has not been done heretofore,) to show that such government may

be practicable, safe, and free. It is for want of such a principle, that the abuses of government in the old world have been vindicated. Monarchies and aristocracies have been submitted to, to save men from the more formidable tyrant of numbers. They have been taught that it is better to yield to one tyrant than to a million of tyrants. Thanks to the conservative principle which has been infused into our Constitution—whether by the design of wise and patriotic men, or the care of a protecting providence—we may hope to obtain all the good which has resulted from monarchies and aristocracies without any mixture of the evil.